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No. 439

In the Supreme Court of the United States

OCTOBER TERM, 1962

W. A. BELCHER, NELL VANDERGRIFF BELCHER, JAMES R. ARMSTRONG, JR., AND MARY BELCHER ARMSTRONG, PETITIONERS

v.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact, conclusions of law, and order of the district court (Pet. App. 12–21) are not officially reported. The opinion of the court of appeals (Pet. App. 29–46) is reported at 302 F. 2d 289. The opinion denying taxpayers' petition for rehearing and amending the opinion of the court of appeals for clarification is reported at 305 F. 2d 557.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1962. (Pet. App. 47–48.) Taxpayers' petition for rehearing was denied on June 29, 1962.

(Pet. App. 52.) The petition for a writ of certiorari was filed on September 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners waived their right to a jury trial on the question whether timber was held by the partnership primarily for sale to customers in the ordinary course of business.

2. Whether, for the purpose of ascertaining the applicability of the capital gain provisions of the 1939 and 1954 Codes, the court of appeals properly reversed a finding of the trial court that timber was not held by the partnership primarily for sale to customers in the ordinary course of its business on the ground that it was contrary to undisputed evidentiary facts.

STATUTES INVOLVED

The pertinent provisions of Section 117 of the Internal Revenue Code of 1939 and Sections 631, 1221, 1222, and 1231 of the Internal Revenue Code of 1954 appear in the Appendix, *infra*, pp. 15–18.

STATEMENT

This case involves adjustments to the income of the Belcher Land and Timber Company, a partnership, resulting in increased tax liabilities of the individual partners, who are the petitioning taxpayers. The Belcher Land and Timber Company was formed on August 1, 1946, and the W. A. Belcher Lumber Com-

pany, Inc. (hereafter referred to as the corporation), commenced operations on the same date. The members of the partnership also own the stock of the corporation in proportion to their respective interests in the partnership. W. A. Belcher has been the chief executive officer of both the partnership and the corporation since their inception. (Pet. App. 30.)

In the years 1950 through 1955 the partnership bought and sold real estate and standing timber.[1] Pursuant to a loose oral arrangement in the nature of a continuing offer by the partnership for the sale of its timber, the corporation purchased and cut standing timber from the land owned or leased by the partnership and manufactured it into lumber. The payment received by the partnership from the corporation was measured by the fair market value of the timber cut.[2]

[1] The purchases of timber by the partnership in the years 1950 through 1955 were as follows (Pet. App. 30-31):

	Number of Purchases	Footage (Board Feet)
1950	16	5,838,194
1951	25	10,555,242
1952	49	4,779,809
1953	59	8,805,923
1954	49	20,311,667
1955	42	16,344,598

[2] The partnership sales to the corporation for the years 1950 through 1955 were as follows (Pet. App. 31):

	Price Paid by Corporation	Footage (Million Board Feet)
1950	$839,432.27	15.4
1951	522,805.53	15.1
1952	495,257.08	14.4
1953	419,419.30	16.1
1954	352,078.20	12.2
1955	512,222.71	16.5

In addition to the sales made to the corporation, the partnership also sold timber to other customers.[3] (Pet. App. 30–32.)

In its tax returns for the years 1950 through 1955 the partnership treated the profits derived from the sales of timber as long-term capital gain. The individual members of the partnership treated their respective distributive shares of these profits in that same manner in their individual tax returns (Pet. App. 32).

After audit of the partnership returns, the Internal Revenue Service found deficiencies in taxes for each of the partners for all of the years 1950 through 1955, inclusive. The year 1953 is the subject matter of pending litigation in the Tax Court and is not involved in this case. The partners paid the assessed deficiencies and, after denial of their claims for refund, commenced actions for refund in the district court. (Pet. App. 32.)

Prior to the trial the respondent Director filed a motion for set-off, urging that neither the partnership nor the individual partners were entitled to capital

[3] The partnership sales to other customers for the years 1950 through 1955 were as follows (Pet. App. 32):

	Timber Held by Partnership for More than 6 Mos.	Timber Held by Partnership for Less than 6 Mos.
1950	$2,148.45	0
1951	2,196.69	0
1952	3,552.32	0
1953	0	0
1954	0	$7,735.00
1955	13,680.00	2,739.05
Total	21,577.46	10,474.05

gain treatment on the partnership sales of timber because, among other reasons, the partnership was engaged in the business of selling logs and timber to customers in the ordinary course of its business. (R. 166–167; Pet. App. 32–33.)

By agreement of the parties only a few of the factual issues presented were submitted to the jury, all others being left to the trial court for determination. (R. 530, 541, 579–580.) The jury was required to answer interrogatories as to the fair market value of timber held for more than six months, and also of timber held for six months or less. Moreover, at the request of the Director, the court gave the jury the following instruction (Pet. App. 34; R. 534, 553):

> You will notice from the questions I am going to hand to you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less and for timber held for more than six months. This separation is important because the tax treatment is different. Timber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates. Therefore your answers will separate the two for each of the years in question. This means that you must first determine which timber was held for more than six months before cutting and which was held for six months or less. After separating the two, you must determine the fair market value of each upon the cutting date.

The jury was not asked to determine, and did not determine, whether the partnership held the timber

primarily for sale to customers in the ordinary course of trade or business. (Pet. App. 13–16, 50.)[4]

In its findings of fact the district court specifically found that the sales of timber for each of the years 1950 through 1955 by the partnership to the corporation were *not* of property held primarily for sale to customers in the ordinary course of the trade or business of the partnership. In its conclusions of law the court held that the gain from sales of timber made by the partnership to the corporation during each of the five years involved here were entitled to capital gain treatment under the Internal Revenue Code. (Pet. App. 18, 21, 34.)

The court of appeals, on the basis of the undisputed evidentiary facts of record, held that the district court "erred in its ultimate determination that the sale of timber for the years in question [was] not of property held primarily for sale to customers in the ordinary course of trade or business" and, consequently, that the sales of timber did not constitute sales of "capital assets" under Section 117(a) of the 1939 Code. Accordingly, it vacated the judgment of the district court and remanded the case for entry of judgment in accordance with its opinion. (Pet. App. 39.)[5]

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[4] The jury was asked to make, and did make, findings with respect to whether particular property known as the Allendale tract of land and that portion of the Crawford tract of land from which the Payne sales were made were held primarily for sale to customers in the ordinary course of trade or business of the partnership during various years in issue, but such findings are not relevant to the issue here. (Pet. App. 15–16, 50.)

[5] The Court of Appeals also sustained the Director's position with respect to other questions concerning income derived from

ARGUMENT

The decision of the court of appeals that the taxpayers' partnership held timber primarily for sale to customers in the ordinary course of its trade or business, and therefore that income from such sales should not be taxed at capital gain rates, rests upon the particular facts of this case, and is clearly correct. Contrary to the taxpayers' assertion, the proceedings below do not involve any infringement of constitutional rights. There are no conflicting decisions. Thus, there is no need for further review by this Court.

1. Taxpayers' contentions that the court of appeals deprived them of rights under the Seventh Amendment of the Constitution are without merit. This case does not involve any reversal of a jury verdict by an appellate court nor any denial of a requested jury trial.

(a) Taxpayers' initial contention (Pet. 24–36) is that the court of appeals improperly reversed a jury verdict as to whether taxpayers' income from partnership timber sales is entitled to capital gains treatment under Section 117 of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 15–17.[2] However, the

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the Allendale tract of land (reversing the district court on one issue and affirming on another issue). (Pet. App. 40–46.) In their petition for certiorari, taxpayers have not sought further review with respect to these issues.

[2] The years 1954 and 1955 are governed by the 1954 Code. However, since the applicable provisions of the 1954 Code (Appendix, *infra*, pp. 17–18) are in most respects the same as their counterparts in the 1939 Code, statutory references herein will for the sake of simplicity be made to the 1939 Code only.

record clearly establishes that, by agreement of the parties, the "sale to customers" issue was not submitted to the jury, but rather was reserved to the court, which decided the issue in taxpayers' favor. (R. 580–582.)[7] Taxpayers concede (Pet. 26–27) that for income from timber sales to qualify for long-term capital gain treatment[8] under Section 117(a), it must be shown not only that the timber was held for more than six months, but also that such "timber was not held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." *Ah Pah Redwood Co.* v. *Commissioner*, 251 F. 2d 163, 168 (C.A. 9th). They assert, however, that in the present case only the holding period was in issue because the pleadings did not frame the question whether the timber was held for sale to customers, and also because, at the request of the Director, the jury was instructed that "[t]imber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates." (Pet. 3.) It

[7] As the court of appeals pointed out (Pet. App. 50), the parties agreed that only specified issues should be submitted to the jury. All other issues were reserved for decision by the trial court.

[8] Gains from the sales of timber constitute capital gains and are given favored capital gains treatment only if (1) the timber is a "capital asset" as defined by Section 117(a) (1) and (4) of the 1939 Code, Appendix, *infra*, p. 15, or (2) the transactions by which the gain is realized coniply with the specific terms of Sections 117(k) (1) or (2) of the 1939 Code, Appendix, *infra*, pp. 16–17. The taxpayers did not assert any rights with respect to the latter sections in the court of appeals and that court accordingly found it unnecessary to discuss them. (Pet. App. 37.)

follows, they say, that the Director must be deemed to have conceded that the timber was not held by the partnership for sale to customers in the ordinary course of its business, and that the jury verdict establishes the amount of taxpayers' capital gain.

In fact, however, the Director made no such concession. In both the trial and appellate proceedings below the Director maintained that the taxpayers are not entitled to capital gains treatment because the specific statutory requirements are not satisfied. Without objection by the taxpayers' counsel, the "sale to customers" issue entered the case on the Director's pre-trial motion for set-off, which asserted, among other things, that during the years 1950–1955, inclusive, the partnership was engaged in the business of selling logs and timber to customers in the ordinary course of its trade or business. (Pet. App. 32–33; R. 167, Par. II.) The record is replete with evidence that the partnership conducted a substantial and active timber selling business. (See Pet. App. 37–39.) And, the district court specifically and unequivocally dealt with this question as one of "those issues tried to the court without a jury" (R. 580). It found that the partnership's sales of timber to the corporation for each of the years 1950–1955 "were not made of property held primarily for sale to customers in the ordinary course of trade or business" (R. 581–582), and concluded that such sales of timber, held for more than six months, "are entitled to capital gain treatment under the appropriate provisions of the Internal Revenue Code of 1939 or 1954, as the case may be." (R. 584.)

Moreover, the Director's request for instructions (Pet. App. 34) on the holding-period issue does not indicate abandonment of the issue under discussion. The Director had offered testimony and exhibits as to the length of time the partnership had held the timber in order to protect the government's interests in the event of a subsequent ruling by the trial court, contrary to the facts, that the partnership did not hold the timber primarily for sale to customers in the ordinary course of its trade or business. Further, since the jury was to determine the fair market value of timber sold by the partnership which had been held for more than six months and the fair market value of such timber which had been held for six months or less, the Director considered it desirable to instruct it as to why it was being asked to separate long-term sales from short-term sales. Thus, in requesting these instructions the Director was merely protecting the record against a possible adverse ruling by the court on a disputed question and in no way abandoned his position with respect to whether the timber was held for sale to customers in the ordinary course of business and therefore was not a capital asset at all.

The agreement between the parties that only specified issues were to be submitted to the jury, was repeatedly referred to by the district court (R. 530, 541, 579–580). Accordingly, without submitting the question to the jury, the court determined in taxpayers' favor that the timber sold by the partnership was not held by it primarily for sale to customers in the ordinary course of its trade or business (R. 581–582). The

jury did not even consider, much less enter a verdict on, that question. Thus, the instant case could not involve any reversal of a jury verdict by an appellate court, and the taxpayers' contention under the Seventh Amendment is without factual foundation.

(b) The above facts also refute taxpayers' alternative contention (Pet. 36–42) that, in violation of the Seventh Amendment, they were denied the right to jury trial on the question whether the partnership's timber sales were of property held by it primarily for sale to customers in the ordinary course of its trade or business. As we have noted, the taxpayers agreed that all issues not specifically submitted to the jury would be decided by the trial court. The Director's motion for set-off plainly introduced the "sale to customers" issue into the case. The court recognized it as one of the "issues tried to the court without a jury" (R. 580) and resolved it in favor of the taxpayers (R. 582) despite overwhelming contrary evidence. Under the circumstances it is entirely clear that petitioners waived their right to a jury determination of this issue. See Federal Rules of Civil Procedure, Rule 49(a);[9] *Ribeiro* v. *United Fruit Co.*, 284 F. 2d 317, 319 (C.A. 2d), certiorari denied, 365 U.S. 872; *Ingersoll* v. *Mason*, 254 F. 2d 899, 903 (C.A.

[9] Rule 49(a) provides that "If * * * [in instructing the jury with respect to special written questions] the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

8th); *Merrill v. Beauté Vues Corp.*, 235 F. 2d 893, 896–897 (C.A. 10th).

2. Finally, taxpayers maintain (Pet. 42–46) that the timber sales in question here were all made to a single vendee (the sales by the partnership to the corporation); that under such circumstances, conflicting inferences can be drawn as to whether these are sales to customers; and, consequently, that the court of appeals was without authority to reverse the district court's finding of fact. This contention, however, rests on an erroneous factual premise. The corporation was not the only vendee to which the partnership sold timber. In every year involved in this case (1950–1952, 1954, 1955), the partnership also sold to other customers, receiving from those sales total income in the amount of $32,051.51. (Pet. App. 32, 38; R. Pltf. Ex. 34.) The fact that the partnership sold *most* of its timber to the corporation does not detract from the fact that it was in the business of selling timber to customers within the meaning of Section 117(a)(1). Nor is there anything in the statute to suggest that sales to a somewhat restricted group of purchasers are not to be considered sales to customers. *Pennroad Corp.* v. *Commissioner*, 261 F. 2d 325 (C.A. 3d), certiorari denied *sub nom. Madison Fund, Inc.* v. *Commissioner*, 359 U.S. 958. Indeed, a single vendee may be a customer for purposes of Section 117(a)(1). *Jantzer* v. *Commissioner*, 284 F. 2d 348 (C.A. 9th).

In the present case the evidence of record overwhelmingly establishes that the partnership was primarily in the business of selling timber to customers.

W. A. Belcher, chief executive officer of both the partnership and the corporation, categorically so stated. (Pet. App. 37–38; R. 271–272.) And the business records of the partnership show huge purchases of standing timber and sales of timber on a regular basis throughout the period in issue. (Pet. App. 31–32, 38–39.) On the basis of such undisputed facts, the court of appeals concluded that "if the sales of timber made by the partnership did not consist of timber held primarily for sale to customers in the ordinary course of trade or business, it is difficult to conceive for what other purpose the timber was held." (Pet. App. 39.) Certainly taxpayers have shown no other purpose. Accordingly, the court of appeals was clearly correct in reversing the district court's erroneous decision.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) [As amended by Section 210(a), Revenue Act of 1950, c. 994, 64 Stat. 906] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

(4) [As amended by Sec. 150(a)(1), Revenue Act of 1942, c. 619, 56 Stat. 798 and Sec. 322(c)(2), Revenue Act of 1951, c. 521, 65 Stat. 452] *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

* * * * *

(j) [As added by Sec. 151(b) of the Revenue Act of 1942, *supra,* and amended by Sec. 127(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Gains and Losses from Involuntary Conversion and From the Sale or Exchange of*

Certain Property Used in the Trade or Business.—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" * * * includes timber with respect to which subsection (k)(1) or (2) is applicable * * *.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. * * *

* * * * * * *

(k) [As added by Sec. 127(a), Revenue Act of 1943, *supra*, and as amended by Sec. 325(b) and (c), Revenue Act of 1951, *supra*] *Gain or loss in the Case of Timber or Coal.*—

(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. * * *

(2) In the case of the disposal of timber or coal (including lignite), held for more than 6 months prior to such disposal, by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber or coal, the difference between the amount received for such timber or coal and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber or coal. * * *
(26 U.S.C. 1952 ed., Sec. 117.)

Sections 1221(1), 1222(3), and 1231 (a) and (b)(2) (26 U.S.C. 1958 ed., Secs. 1221, 1222, and 1231) are the corresponding provisions in the 1954 Code to the provisions of Section 117 (a) and (j) of the 1939 Code set forth above and are in all pertinent respects the same. Section 631 is the corresponding provision in the 1954 Code to Section 117(k) of the 1939 Code and is set forth below.

Internal Revenue Code of 1954:

SEC. 631. GAIN OR LOSS IN THE CASE OF TIMBER OR COAL.

(a) *Election to Consider Cutting As Sale or Exchange.*—If the taxpayer so elects on his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than 6 months before the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. * * *

(b) *Disposal of Timber With a Retained Economic Interest.*—In the case of the disposal of timber held for more than 6 months before such disposal, by the owner thereof under any

form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof, shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber. * * * For purposes of this subsection, the term "owner" means any person who owns an interest in such timber, including a sublessor and a holder of a contract to cut timber.

* * * * * *

(26 U.S.C. 1958 ed., Sec. 631.)

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